Supreme Court, U.S.
FILED
APR 22 1980
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

October Term, 1979.

## No. 79-1497.

CATHERINE C. ALFREE,

*Appellant,*

*v.*

EDWIN W. ALFREE, JR.,

*Appellee.*

On Appeal From the Supreme Court of Delaware.

## MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT THEREOF.

MASON E. TURNER, JR.,
WAYNE N. ELLIOTT,
VERNON R. PROCTOR,
PRICKETT, JONES, ELLIOTT & KRISTOL,
1310 King Street,
Wilmington, Delaware 19801

*Attorneys for Appellee.*

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

# INDEX.


| | Page |
|---|---|
| OPINION BELOW | 1 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED | 1 |
| QUESTION PRESENTED | 1 |
| STATEMENT OF THE CASE | 2 |
| ARGUMENT | 4 |
| The Appeal Should Be Dismissed or Summarily Affirmed Because it Fails to Present a Substantial Federal Question | 4 |
| CONCLUSION | 14 |

## TABLE OF CITATIONS.


**Cases:** Page

Bailey v. Pennington, Del. Supr., 406 A. 2d 44 (1979), appeal dismissed, 48 U. S. L. W. 3517 (1980) ..... 11, 12
Brawner v. Brawner, Mo. Supr., 327 S. W. 2d 808 (1959), cert. den. 361 U. S. 964 (1960) ..... 6
Califano v. Jobst, 434 U. S. 47 (1977) ..... 7, 8, 9, 10
Cannon v. Oviatt, Utah Supr., 520 P. 2d 882 (1974), appeal dismissed, 419 U. S. 810 (1974), reh. den. 419 U. S. 1060 (1974) ..... 4
Conley v. Conley, Mont. Supr., 15 P. 2d 922 (1932) ..... 6
Heckendorn v. First National Bank, Ill. Supr., 166 N. E. 2d 571 (1960), cert. den. 364 U. S. 882 (1960) ..... 6
Justice v. Gatchell, Del. Supr., 325 A. 2d 97 (1974) ..... 11
Locklair v. Locklair, 256 F. Supp. 530 (D. S. C. 1966) .... 5
Loving v. Virginia, 388 U. S. 1 (1967) .. ..... 7, 10
Mapes v. United States, 576 F. 2d 896 (Ct. Cl. 1978) ..... 9
Maynard v. Hill, 123 U. S. 189 (1888). ..... 7
O'Neill v. Dent, 364 F. Supp. 565 (E. D. N. Y. 1973) .....6, 7, 10
Paiewonsky v. Paiewonsky, 466 F. 2d 178 (3rd Cir. 1971); cert. den. 405 U. S. 919 (1972) ..... 5
Sidel v. Majors, 536 F. 2d 1156 (7th Cir. 1976); cert. den. 429 U. S. 945 (1976) ..... 11
Silver v. Silver, 280 U. S. 117 (1929) ..... 11
Smith v. Smith, Ore. Supr., 287 P. 2d 572 (1955) ..... 6
Smith v. Smith, Pa. Super., 362 A. 2d 756 (1976) ..... 6
Southwestern Community Action Council, Inc. v. Community Services Administration, 462 F. Supp. 289 (D. W. Va. 1978) ..... 9
Steffa v. Stanley, Ill. App., 350 N. E. 2d 886 (1976) ..... 6
Thompson v. Thompson, 218 U. S. 611 (1910) ..... 4
Wartell v. Formusa, Ill. Supr., 213 N. E. 2d 544 (1966) ..... 6
White v. Hughes, Ark. Supr., 519 S. W. 2d 70 (1975), appealed dismissed, 423 U. S. 805 (1975) ..... 11
Zablocki v. Redhail, 434 U. S. 374 (1978) .....7, 9, 10


## TABLE OF CITATIONS (Continued).


**Statutes:** Page

Delaware Code:
10 Del. C. §§ 6301 ..... 12
Title 13, generally ..... 4, 12
13 Del. C. § 507 ..... 13
13 Del. C. § 508 ..... 13
13 Del. C. § 721 ..... 13
13 Del. C. § 1504 ..... 13
13 Del. C. § 1512 ..... 13
13 Del. C. § 1513 ..... 13
21 Del. C. § 2118 ..... 2, 3
21 Del. C. § 6101 ..... 3, 11
United States Constitution:
Fifth Amendment ..... 9
Fourteenth Amendment ..... 1, 2

**Miscellaneous:** Page

Annotation, Interspousal Tort Immunity, 92 A. L. R. 3d 901 (1979) ..... 10

## MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT THEREOF.

The Appellee moves this Court, pursuant to Supreme Court Rule 16, to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Delaware entered on December 26, 1979, on the ground that the question on which the decision depends does not present a substantial federal question.

## OPINION BELOW.

The opinion of the Supreme Court of Delaware is reported at 410 A. 2d 161 and is set forth in the Appellant's Appendix at page A-1.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

This case involves the Fourteenth Amendment to the Constitution of the United States:

> ". . . ; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This case also involves the common law doctrine of interspousal tort immunity, derived from the common law of England and retained by the State of Delaware and which was stated by the court below as follows:

> "It is settled law in Delaware that one spouse may not sue the other at law in tort." (410 A. 2d at 162).

## QUESTION PRESENTED.

Does the Fourteenth Amendment to the United States Constitution guarantee a spouse the right to sue the other in tort for an alleged tort committed during coverture?

## STATEMENT OF THE CASE.

On June 26, 1976, Appellant and Appellee were husband and wife, having been married in the State of Delaware and having continued to reside in the state thereafter. On that date, Appellant was a guest passenger in an automobile operated by her husband, when that automobile was involved in a single vehicle accident. Appellant sustained injuries in that accident and has sued her husband to recover money damages as a result of those injuries.

The parties are still husband and wife, although they have separated since the inception of this lawsuit in September, 1977.

Delaware law provides a two-tier mechanism for compensation for persons injured in automobile accidents. Under Delaware law, any person so injured, including the plaintiff in this action, has the automatic right to recover compensation for medical expenses, net lost earnings and certain other defined expenses pursuant to the Delaware "no-fault" insurance scheme. 21 *Del. C.* § 2118. This insurance compensation, which is mandatory under Delaware law, provides prompt, first party compensation regardless of fault and must be made available in an amount no less than the amount required for liability insurance policies under the Delaware Financial Responsibility Law, presently $10,000 per person and $20,000 for a single accident. Greater coverages are available. The challenged interspousal tort immunity doctrine is in no way implicated in the no-fault compensation scheme, and the plaintiff herein has had the benefit of such compensation.

The second tier of the Delaware compensation system permits certain injured persons to bring actions to recover damages not compensable* under the no-fault system. Thus, suit can be brought to seek recovery for pain and suffering, permanent injury, and any out-of-



pocket expenses either not covered by no-fault insurance or which exceed the available insurance coverage. A party may not, however, plead or recover items compensable under the no-fault plan. 21 *Del. C.* § 2118(g).

This second tier right of action is based upon traditional notions of fault, requiring the injured party to prove negligence of the third party, who in turn would have available such traditional defenses as contributory negligence and assumption of the risk. Moreover, Delaware law does not permit a guest passenger, such as Appellant herein, to sue her host driver based upon mere negligence. The Delaware guest statute, 21 *Del. C.* § 6101, permits a right of action by a guest passenger only for intentional misconduct or wilful or wanton disregard of the guest's rights.

This tort action by the wife against her husband was commenced in September, 1977 in the Superior Court of the State of Delaware in and for New Castle County. On June 6, 1978, the husband moved for summary judgment, asserting that the claim was barred by the doctrine of interspousal tort immunity. On February 2, 1979, the Superior Court granted Appellee's motion in an unreported decision reproduced at page A-13 of Appellant's Appendix. This decision was appealed to the Delaware Supreme Court which affirmed in an opinion dated August 16, 1979, reproduced at page A-10 of Appellant's Appendix. The Delaware Supreme Court subsequently granted plaintiff's motion for reargument, limiting that reargument to the question presented to this Court—namely, whether the doctrine of interspousal tort immunity violates the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. On December 26, 1979, the Delaware Supreme Court answered the stated question in the negative, and this appeal followed.

## ARGUMENT.

**The Appeal Should Be Dismissed or Summarily Affirmed Because it Fails to Present a Substantial Federal Question.**

Appellant cites this Court to no authority standing for the proposition that there is a constitutional right for one spouse to sue his or her mate for torts allegedly committed during coverture. In *Thompson v. Thompson,* 218 U. S. 611 (1910), this Court upheld the dismissal of a wife's tort action against her husband on the basis of the interspousal immunity doctrine then extant in the District of Columbia. This Court noted:

> "Whether the exercise of such jurisdiction would be promotive of the public welfare and domestic harmony is at least a debatable question. The possible evils of such legislation might well make the law making power hesitate to enact. But these and kindred considerations are addressed to the legislative, not the judicial, branch of the government." (218 U. S. at 618)

Although the Court in *Thompson* did not directly address the constitutional question raised here, it did note that the state (the District of Columbia) through the exercise of its police power had provided a number of alternative remedies to the allegedly injured spouse, including criminal prosecution, rights under divorce and alimony laws and the protection of property through the intervention of chancery. The Appellant herein, in addition to similar protections provided by Delaware law in its regulation of the marriage relationship (see Title 13, Delaware Code of 1953) has had the benefit of compensation under the



Delaware no-fault insurance plan, which is not affected by the interspousal immunity doctrine.

Every federal and state court which has had occasion to consider a constitutional challenge to the interspousal immunity doctrine has found that the doctrine is not constitutionally infirm. In *Locklair v. Locklair,* 256 F. Supp. 530 (D. S. C. 1966), the plaintiff, a South Carolina resident, sought to sue her husband as a result of injuries sustained in an automobile accident which occurred in Georgia. Georgia retained the common law doctrine of interspousal tort immunity. The court held that Georgia law applied and that the immunity doctrine was not constitutionally suspect, noting:

> ". . . [T]here is no discrimination nor denial of equal protection of the laws insofar as plaintiff is concerned, inasmuch as the Georgia law applies equally to husbands as well as to wives." (256 F. Supp. at 533).

In ordering dismissal of the action, the court noted that "plaintiff has no constitutional right to sue her husband." (*Id.*)

In *Paiewonsky v. Paiewonsky,* 466 F. 2d 178 (3rd Cir. 1971); *cert. den.* 405 U. S. 919 (1972), the Third Circuit Court of Appeals upheld the interspousal tort immunity doctrine of the Virgin Islands against a constitutional challenge. The plaintiff in *Paiewonsky,* as does plaintiff here, contended that the doctrine constituted a classification violative of the Equal Protective Clause of the Fourteenth Amendment. In rejecting that contention, the court stated:

> "Since we have not been convinced that the immunity doctrine lacks substantial vitality, we think it follows that it has a reasonable relationship to the interest sought to be furthered by it. In sum, we believe that the legislative interest in promoting

domestic tranquility is sufficiently compelling upon the facts of this case to support the classification in question." (446 F. 2d at 182).

See also *Smith v. Smith*, Pa. Super., 361 A. 2d 756 (1976); *Brawner v. Brawner*, Mo. Supr., 327 S. W. 2d 808 (1959), *cert. den.* 361 U. S. 964 (1960); *Conley v. Conley*, Mont. Supr., 15 P. 2d 922 (1932); *Smith v. Smith*, Ore. Supr., 287 P. 2d 572 (1955); *Heckendorn v. First National Bank*, Ill. Supr., 166 N. E. 2d 571 (1960), *cert. den.* 364 U. S. 882 (1960); *Wartell v. Formusa*, Ill. Supr., 213 N. E. 2d 544 (1966); *Steffa v. Stanley*, Ill. App., 350 N. E. 2d 886 (1976).

Plaintiff contends that the interspousal tort immunity doctrine must be judged by "strict scrutiny" standards because a fundamental right—marriage—is involved. She contends that this analysis is supported by the decision in *O'Neill v. Dent*, 364 F. Supp. 565 (E. D. N. Y. 1973). That case involved a challenge to a regulation of the United States Merchant Marine Academy which absolutely prohibited cadets from marrying while enrolled in the Academy and which denied admission to any person who had ever been married. The court held that the right to marry is a constitutional right and that the government cannot condition receipt of benefits (attendance at the Academy) upon waiver of fundamental constitutional rights. The court conducted an evidentiary hearing to determine whether it could be shown that there was a rational basis for the marriage prohibition and found that there was virtually no evidence supporting the defendant's claims that married students would not perform at the Academy as well as unmarried students. The court therefore concluded that the conclusive presumption against marriage was invalid under either the strict scrutiny or substantial relation tests.



The critical factor in the *O'Neill* decision, of course, is that the challenged law constituted an absolute prohibition to the right to marry. In this sense, the law was comparable to the statute invalidated by this Court in *Loving v. Virginia*, 388 U. S. 1 (1967). The severe burden on the right to marry imposed by the miscegenation law at issue in that case was based upon an explicit racial classification and was therefore condemned under the strict scrutiny standard. While total prohibition of the right to marry, particularly when based upon an invidious classification, may constitute a denial of rights guaranteed by the Fourteenth Amendment, it is clear that "marriage is a social relation subject to the state's police power." *Maynard v. Hill*, 123 U. S. 190 (1888). The interspousal tort immunity doctrine does not prohibit marriage or constitute any form of sex discrimination, and it is not based on any suspect classification. At most, the doctrine is a mere incident of marriage, properly within the scope of the state's regulatory police power.

This Court has recently considered the degree and content of permissible restrictions on the right to marry in *Califano v. Jobst*, 434 U. S. 47 (1977) and *Zablocki v. Redhail*, 434 U. S. 374 (1978). In *Zablocki*, this Court struck down a Wisconsin statute which provided that any resident having minor issue not in his custody whom he was under an obligation to support could not marry without court approval. Justice Marshall found the statute invalid because of the burden which it imposed upon the decision to marry on the part of certain indigent individuals. Justice Marshall did apply the strict scrutiny standard because of the "directness and substantiality of the interference with the freedom to marry." (434 U. S. at 387 n. 12). Nevertheless, he recognized that strict scrutiny was not appropriate for all official decisions which might have some incidental effect upon the marital relationship:

"By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with the decisions to enter into the marital relationship may legitimately be imposed. See *Califano v. Jobst* [citations omitted]. The statutory classification at issue here, however, clearly does interfere directly and substantially with the right to marry." 434 U. S. at 386-7.

In *Califano v. Jobst*, 434 U. S. 47 (1977), this Court upheld certain sections of the Social Security Act which provided for the termination of a dependent child's benefits upon his marriage to an individual not entitled to benefits under the Act. Justice Stevens found that those provisions did not impose an undue burden upon the decision to marry:

"Since it was rational for Congress to assume that marital status is a relevant test of probable dependency, the general rule which obtained before 1958, terminating all child's benefits when the beneficiary married, satisfied the constitutional test normally applied in cases like this. [Citations omitted]. That general rule is not rendered invalid simply because some persons who might otherwise have married were deterred by the rule or because some who did marry were burdened thereby. For the marriage rule cannot be criticized as merely an unthinking response to stereotyped generalizations about a traditionally disadvantaged group, or as an attempt to interfere with the individual's freedom to make a decision as important as marriage.



The general rule, terminating upon marriage the benefits payable to a secondary beneficiary, is unquestionably valid." 434 U. S. at 53-54 (footnotes omitted).

The central teaching of *Zablocki* and *Jobst* is that strict scrutiny will be applied to a marriage-related law only when that law significantly interferes with the decision to marry or the right of marriage. In *Mapes v. United States*, 576 F. 2d 896 (Ct. Cl. 1978), a married couple challenged certain provisions of the Internal Revenue Code on the ground, inter alia, that married couples could not take advantage of the lower combined tax rates applicable to unmarried taxpayers. The Court of Claims, using a rational basis test, concluded that the challenged sections of the Internal Revenue Code did not impose an impermissible burden upon the right to marry under the Fifth Amendment:

"Admittedly, the right to marry is a fundamental right. Nevertheless, we read the *Jobst* and *Zablocki* cases together to imply that the application of strict scrutiny is appropriate where the obstacle to marriage is a direct one, i.e., one that operates to preclude marriage entirely for a certain class of people, as in *Zablocki*. The effect of the rates of Code Section 1 is somewhat analogous to the effect of the termination of social security benefits in *Jobst*: the elevated tax burden might in fact dissuade some couples from entering into matrimony, but does not present an insuperable barrier to marriage." (576 F. 2d at 901).

Likewise, in *Southwestern Community Action Council, Inc. v. Community Services Administration*, 462 F. Supp. 289 (D. W. Va. 1978), a county action agency brought an action for a declaratory judgment seeking a

determination of the validity of a regulation promulgated by the defendant which barred the employment of a person by an agency in a job over which a member of that person's immediate family exercised supervisory authority or served on a board or committee with authority to order personnel actions affecting his job. The court held that the regulation did not violate the due process clauses of the Fifth and Fourteenth Amendments, basing its decision upon an analysis of the distinction between the holdings in *Zablocki* and *Jobst*. 462 F. Supp. at 296-298. The court found that the regulation at issue did not "significantly interfere" with an affected couple's right to marry. 462 F. Supp. at 298.

The interspousal tort immunity doctrine in no way interferes with the right to marry and is certainly not a preclusion of that right for some persons, as were the challenged laws in *Zablocki, Loving,* and *O'Neill, supra.* Plaintiff has produced no proof that the immunity doctrine has impaired or interfered with anyone's right to marry, and it is extremely doubtful that the ability to sue one's spouse in tort enters the marriage decision making process at all.

When viewed by other than the strict scrutiny standard, it cannot be said that the interspousal tort immunity doctrine lacks any rational basis or that it does not bear a substantial relation to legitimate state interests. As noted in Appellant's jurisdictional statement, some states have judicially abandoned the interspousal tort immunity doctrine. Delaware and a number of other states, however, have chosen to retain it and to leave any changes to the will of the legislature. See generally Annotation, *Interspousal Tort Immunity,* 92 A. L. R. 3d 901 (1979). That there should be such judicial deference with respect to the doctrine is particularly appropriate in the context of



the Delaware tort scheme and statutory regulation of the marital relation. As the Delaware Supreme Court pointed out in its opinion, there would be serious, far reaching potential consequences to the marriage relation itself and its treatment within the judicial system if the interspousal immunity doctrine were to be abandoned. (410 A. 2d at 162).

Initially, it must be emphasized that under the Delaware automobile injury compensation system, primary reliance is placed upon the no-fault concept which permits compensation of injured persons such as this Appellant regardless of marital status or fault.

The second tier of the Delaware compensation system is based upon a showing of fault. Most interspousal automobile claims arise in a situation where one spouse is a guest passenger in a vehicle operated by the other spouse. Under Delaware law, 21 *Del. C.* § 6101, guest passengers have no cause of action against a host driver for negligence but can recover only upon proof of intentional harm or wilful or wanton disregard of the guest's rights. This differential treatment of guests and non-guests, based upon considerations not dissimilar from some of those justifying the interspousal tort immunity doctrine, has been upheld against equal protection and due process challenges. *Silver v. Silver,* 280 U. S. 117 (1929); *Justice v. Gatchell,* Del. Supr., 325 A. 2d 97 (1974); *Cannon v. Oviatt,* Utah Supr., 520 P. 2d 882 (1974), appeal dismissed, 419 U. S. 810 (1974), *reh. den.* 419 U. S. 1060 (1974); *White v. Hughes,* Ark. Supr., 519 S. W. 2d 70 (1975), appeal dismissed, 423 U. S. 805 (1975); *Sidel v. Majors,* 536 F. 2d 1156 (7th Cir. 1976); *cert. den.* 429 U. S. 945 (1976); *Bailey v. Pennington,* Del. Supr., 406 A. 2d 44 (1979), appeal dismissed, 48 U. S. L. W. 3517 (1980).

The applicability and validity of the Delaware guest statute suggests that the number of cases in which the interspousal tort immunity doctrine would be determinative in the automobile tort context is limited. However, the applicability of the guest statute suggests serious policy considerations to which judicial deference should be granted. It is certainly reasonable to believe, as did the court below, that suits requiring allegations of either intentional wrongdoing or wilful or wanton misconduct, are of the very nature that would tend to produce marital discord. Wilful or wanton conduct has been defined by the Delaware court to be conduct assuming the character of maliciousness or wickedness. *Bailey v. Pennington,* Del. Supr., 406 A. 2d 44 (1979).

A further, complicating policy consideration which was properly accorded weight by the Delaware Supreme Court is that under Delaware law, an alleged tort-feasor may seek contribution from another person alleged to be jointly liable to an injured person. 10 *Del. C.* §§ 6301, et seq. Frequently in cases of automobile accidents involving two or more vehicles, an injured spouse passenger will sue the driver or drivers of the other vehicles seeking personal injury compensation. In the absence of the immunity doctrine, the spouse driver could be involuntarily joined as a third party defendant for contribution and forced to defend allegations of wilful or wanton misconduct in a case brought by his or her spouse. Certainly, such involuntary interspousal suits can rationally be said to have the potential for disrupting marital harmony.

Abolition of the immunity doctrine would have potentially deleterious effects in other fields. Title 13 of the Delaware Code provides a comprehensive and coordinated statutory framework defining the rights and



obligations which flow from the marital relation. All legal actions dealing with discord in the marital relation are presently within the exclusive jurisdiction of the Family Court of the State of Delaware, which has exclusive jurisdiction, inter alia, to determine petitions for divorce, grant alimony, award child custody, make divisions of marital property and the like. 13 *Del. C.* §§ 507, 508, 721, 1504, 1512 and 1513. The abolition of the interspousal tort immunity doctrine would raise the likelihood that many marital disputes would lead not only to legal actions in the Family Court but would be accompanied by separate interspousal tort suits (and countersuits) in other courts of the state. Besides increasing the case load of the judiciary of the State of Delaware, such suits would derogate from the unitary scheme which presently exists in the Family Court for the single, comprehensive resolution of marital disputes.

Finally, as the Supreme Court of Delaware noted, Delaware law attributes many protective features to the marital relation which are not available to non-married persons, including the duty of support, the right to inherit, and the right to hold property free from a spouse's creditors as tenants by the entirety. In this context of special rights and disabilities flowing from the marital relation, it is rational for the State of Delaware to bar interspousal tort actions as being a potential source of marital disharmony. Such a limitation based on the marital relation is not constitutionally infirm, particularly in a context where the state law grants an automatic right to compensation without regard to fault, where most interspousal automobile accident cases would require proof of wilful or wanton disregard of the spouse's rights, and where abolition of the doctrine would destroy a previously established unitary framework for the resolution of all marital disputes.

## CONCLUSION.

This appeal should be dismissed or the decision below affirmed because the question on which the decision depends does not present a substantial federal question.

Respectfully submitted,

MASON E. TURNER, JR.,
WAYNE N. ELLIOTT,
VERNON R. PROCTOR,
PRICKETT, JONES, ELLIOTT & KRISTOL,
1310 King Street,
Wilmington, Delaware 19801
*Attorneys for Appellee.*

DATED: April 22, 1980



## PROOF OF SERVICE

AND NOW, TO WIT, this 22nd day of April, A. D., 1980, I hereby certify that all parties required to be served have been served copies of Appellee's Motion to Dismiss or Affirm for Want of a Substantial Federal Question, and the accompanying Brief in support of the Motion, that service has been made on Appellant pursuant to Rule 33(1) by mailing three copies, by depositing them at the United States Post Office at Wilmington, Delaware, first class postage, prepaid, on April 22, 1980, to Appellant's counsel of record: Stephen B. Potter, Esquire, P. O. Box 1207, Wilmington, Delaware 19801.

MASON E. TURNER, JR.,
PRICKETT, JONES, ELLIOTT
& KRISTOL,
1310 King Street,
Wilmington, Delaware 19801